(5) (1)

Nos. 86-2043, 86-2044

IN THE

Supreme Court of the United States

October Term, 1986

PUBLIC SERVICE COMMISSION: PAUL L. GIOIA, CHAIRMAN; and COMMISSIONERS EDWARD P. LARKIN, CARMEL C. MARR, HAROLD A. JERRY, JR., ANNE F. MEAD, ROSEMARY S. POOLER, and GAIL GARFIELD SCHWARTZ,

Petitioner,

vs.

JOSEPH CAHILL,

Respondent.

NEW YORK PUBLIC SERVICE COMMISSION REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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The respondent (Joseph Cahill) argues that the Court should not review the New York Court of Appeals' state action decision because the lower court's ruling was correct and, in any event, "there very likely will be opportunity for this Court to review all of the issues in this case" after additional state proceedings (Cahill, 11). Both arguments are addressed below.

POINT I

The respondent's state action theory erroneously assumes that by allowing utilities to recover charitable contributions in rates, the Commission is forcing management to make gifts and to seek reimbursement from the consumer.

According to Mr. Cahill, state action inquiries should turn on "whether the state has caused the constitutional violation asserted in the complaint" (Cahill, 11). Reasoning that the Commission's policy of allowing rate recovery of utility charitable contributions "requires ratepayers to subsidize these contributions," the respondent concludes that state action causes the alleged aggrievement. Mr. Cahill's position is incorrect because it confuses "but for" causation with direct causation; that is, it ignores the crucial distinction between the state's approval of a utility proposal (*e.g., allowing* proposed tariffs to take effect; *allowing* a proposed plant to be built; *allowing* a proposed financing to occur, *allowing* charitable contributions to be recovered in rates) and the state's mandating of utility action (*e.g., directing* companies to conduct Home Energy Use audits; *directing* utilities to purchase power from co-generators; *directing* companies to include understandable language in bills). As the Court stated in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974), "approval . . . where the Commission has not put its weight on the side of the proposed practice by *ordering* it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action' " (emphasis added). *Id.* at 357.

The Commission's ratemaking policy of allowing recovery of charitable contributions leaves utility management with the ultimate decisions of a) whether to make contributions; b) who will receive them; and c) how they will be funded.[1] Management could decide not to make any charitable contribution or it could elect to fund all contributions from shareholder earnings, and it would hear no complaint from the Commission. Thus, it is incorrect for the petitioner to allege that the Commission's policy "requires ratepayers to subsidize these contributions" (Cahill, 12).[2]

When one recognizes the Commission's ratemaking policy for what it is, the approval—as opposed to the mandating—of private conduct, it becomes clear that the Court of Appeals erred in finding state action. Mr. Cahill has not alleged a constitutional claim against the Commission.

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[1] Contrary to respondent's suggestion that the Commission "is intimately involved with regulating the donation process," the policy leaves the selection of charities to utility management. Naturally, if management were to earmark groups which did not qualify as charities under federal or state law, the Commission would question the inclusion of such "contributions" in rates, but it would never mandate other donees.

[2] The Commission arguably could prohibit the rate recovery of gifts and thereby cure Mr. Cahill's complaint, but, again, the failure to prohibit offensive private conduct is not state action for the purpose of a constitutional claim. *Jackson v. Metropolitan Edison Company, supra; Blum v. Yaretsky*, 457 U.S. 991 (1982).

POINT II

The New York Court of Appeals' state action decision is final and, therefore, ripe for review.

Although the New York Court of Appeals' state action decision is final, and—in our view—directly at odds with precedent of this Court, the respondent argues that review should be delayed until the state also decides whether the Commission's ratemaking policy infringes on Mr. Cahill's First Amendment freedoms. Mr. Cahill reasons that the prospect of *certiorari* after a trial on the merits justifies denying review at this time.[3]

In *Cox Broadcasting Company v. Cohn*, 420 U.S. 469 (1975) the Court noted that "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice' [cite omitted]" where 1) a federal issue has been finally decided by the state courts; 2) the losing party might prevail in the remaining state proceedings, foreclosing review of the federal issue; and 3) reversal of the state court on the federal issue would terminate the litigation. *Id.* at 477-78, 482-83. The state action question has been decided by New York's highest court; if *certiorari* were to be denied and the Commission prevailed in the remaining state proceeding, review of the Court of Appeals' state action decision would be foreclosed unless Mr. Cahill appealed; and a reversal of the Court of Appeals' state

[3] Respondent's reliance on the Johnson Act in support of its "ripeness" position is misplaced. The Johnson Act was simply designed to channel initial review of intrastate ratemaking orders from federal District Courts to state courts. It has no relevance to the Supreme Court's plenary jurisdiction of state action.

action decision would terminate this litigation. Therefore, under the rule established in *Cox Broadcasting*, this case is ripe for review.[4]

Further, costly litigation will ensue in this case if the Court of Appeals' decision is not immediately reviewed.[5] The parties will be required to analyze Mr. Cahill's First Amendment claims at length, debating whether charitable giving is reasonably related to the provision of utility service. *See, City of Los Angeles v. Preferred Communications Inc.*, _____ U.S. _____, 106 S.Ct. 2034 (1986); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). This litigation will be for naught if the Court of Appeals' decision is in error.

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[4] While only issues of state law remained for remand in *Cox Broadcasting Corp.*, the instant case would address whether the Commission's policy actually infringes on Mr. Cahill's First Amendment freedoms. However, that issue is independent of the state action question for which the Commission seeks review. *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482, n.10; *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

[5] Indeed, the Court of Appeals' decision arguably constitutionalizes all utility conduct approved by regulatory agencies. Thus, judicial economy calls for the granting of the Commission's petition.

Conclusion

Unless review is granted, a body of case law will have taken root which is directly at odds with relevant precedent of this Court. The ramifications of the Court of Appeals' decision are far-reaching and, in our view, pernicious. The Commission's petition for certiorari should therefore be granted.

Respectfully submitted,

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